A

Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–1075 OF 2007

ABDUL MALIK ISHAK, AZHAR MA'AH AND CLEMENT SKINNER JJCA

14 SEPTEMBER 2011

C

Civil Procedure — Pleadings — Material facts — Whether 'full particulars' of claim for fraudulent misrepresentation must be pleased — Whether sufficient to plead only the 'necessary particulars' — Rules of the High Court 1980 O 18 r 12

D

Civil Procedure — Pleadings — Statement of claim — Whether prayer in statement of claim ambiguous — Whether claim may be dismissed in entirely due to ambiguity in prayer

E

Contract — Breach — Agreement — Earth filling agreement — Failure by employer to pay to contractor for completed works — Whether amounting to breach — Whether breach sufficiently proven

F

Contract — Collateral contract — Nature of — Whether oral agreement providing for payment arrangement constituted collateral contract — Whether oral agreement complemented written agreement — Whether proviso (b) to s 92 of the Evidence Act 1950 applicable — Evidence Act 1950 s 92

G

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H

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I

The first defendant employed the plaintiff as main contractor pursuant to an earth filling agreement ('the agreement'). The plaintiff subcontracted the work

to the second defendant. The plaintiff contended that prior to the execution of the agreement between the plaintiff and the first defendant and issuance of a letter of award by the plaintiff to the second defendant, there existed an oral agreement between the plaintiff, the first and second defendants where the first defendant would engage plaintiff as their contractor to clear, earth fill and level lands belonging to the first defendant, on condition that the plaintiff engaged the first defendant's nominated subcontractor ie, the second defendant as the plaintiff's subcontractor to carry out the work. Payment to the plaintiff by the first defendant would be made back to back immediately upon the second defendant receiving its payment from the plaintiff. On 18 November 1997 the second defendant submitted their first interim payment of RM900,000 to the plaintiff for part of the said work done and the plaintiff paid the second defendant RM700,000. On 20 November 1997, the plaintiff submitted their progress claim No 1 to the first defendant for a value of work done as at 15 November 1997 of RM1m and the first defendant refused to pay the plaintiff. The plaintiff contended that there was fraudulent misrepresentation in that the second defendant through the third defendant had induced the plaintiff to pay the second defendant a sum of RM700,000 while at all material times the second defendant knew that the first defendant would not pay the plaintiff at all. The plaintiff also contended that they were entitled to claim a pre-liquidated damages of RM50,000 from the second defendant for non-completion of the said work on the ground that the second defendant should have undertaken and completed the said work on 18 January 1998. The second defendant had abandoned the work after receiving the payment of RM700,000 from the plaintiff. The defendants denied the said oral agreement, the liability and quantum as alleged by the plaintiff. The learned judicial commissioner ('JC') dismissed the plaintiff's claim and the first defendant's counterclaim. The plaintiff filed this appeal and the first defendant cross-appealed. The following issues arose for determination: (i) whether the JC was right in holding that prayer (1) of the plaintiff's statement of claim was ambiguous and cannot be entertained and, consequently dismissing the plaintiff's claim entirely; (ii) whether the JC was right in dismissing the plaintiff's claim against the first defendant notwithstanding the fact that there was evidence that the first defendant had failed to pay the plaintiff's first payment claim of RM1m and thereby breaching the agreement; (iii) whether the JC was right in holding that the oral agreement infringed s 92 of the Evidence Act 1950 ('Act'); (iv) whether the JC was right in holding that there was no fraudulent misrepresentation by the defendants and/or the third defendant; and (v) whether the second defendant ought to pay the pre-liquidated damages of RM50,000 per month from 18 January 1998 onwards for failing to complete the said work.

Held, allowing the plaintiff's appeal and dismissing the first defendant's cross-appeal:

(1) The JC erred in holding that the amendment to prayer (1) was

ambiguous and cannot be entertained. The JC failed to appreciate the basis of the plaintiff's claim (see para 22).

(2) It was wrong for the JC to dismiss the whole of the plaintiff's claim when there was ample evidence adduced that blatantly pointed to the breach committed by the first and second defendants under the agreement and the award letter (see para 35).

(3) Where the terms of the contract have been incorporated into an agreement, the general rule is that extrinsic evidence may not be given to contradict, vary, add to, or substract the said agreement. However, extrinsic evidence may be introduced to show to the world at large, so to speak, that the written agreement did not represent the whole bargain between the parties. In order to show whether there is a valid written agreement, parol evidence may be admissible in order to show that the written agreement is not a valid contract because there was never any agreement between the parties (see paras 46–48).

(4) There was no inconsistency between the oral agreement alluded to by Anne Kung (PW1), the CEO (chief executive officer) of the plaintiff with cl 6 of the agreement. Clause 6(b) of the six agreement merely stated that the said sum to be paid progressively within six months from the date of the agreement. But, it is silent as to 'when and how' the first defendant ought to make its progressive payment to the plaintiff and this gap was filled in by the oral agreement. Hence, the oral agreement fell squarely within the ambit of proviso (b) to s 92 of the Act. It did not add or contradict cl 6(b) of the agreement but on the contrary, complemented the agreement by proving the 'back to back' payment arrangement between the parties (see paras 53–56).

(5) The JC erred in holding that the plaintiff failed to plead the 'full particulars' of the fraudulent misrepresentation as envisaged under O 18 r 12 of the Rules of the High Court 1980. According to O 18 r 12(1), only the 'necessary particulars' need be pleaded and not the 'full particulars' as required by the JC (see paras 71 & 73).

(6) The third defendant was the common director and shareholder of both the first and the second defendants. By virtue of the false representation by the third defendant, the plaintiff was defrauded (see paras 74 & 77).

(7) The plaintiff's claim against the second defendant for pre-liquidated damages of RM50,000 ought to be allowed because there was evidence that the second defendant abandoned the work after receiving RM700,000 from the plaintiff. The plaintiff had not committed any repudiatory breach and had not instructed the second defendant to stop work (see paras 78–79).

(8) In the context of the cross-appeal, the first defendant had failed to prove

or show that the first defendant had suffered damages. At all material times, the first defendant was the 'wrong doer' for refusing to pay the plaintiff the first progressive claim despite the evidence that showed that 30% of the said work had been completed by the second defendant and that the plaintiff had even paid the second defendant the sum of RM700,000 as partial payment (see paras 80–81).

[Bahasa Malaysia summary

Defendan pertama diambil bekerja oleh plaintif sebagai kontraktor utama menurut sebuah perjanjian mengisi tanah 'earth filling agreement' ('perjanjian'). Plaintif memberikan sub-kontrak kerja tersebut kepada defendan kedua. Plaintif menghujah bahawa sebelum perjanjian di antara plaintif dan defendan pertama dimeterai dan surat award dikeluarkan oleh plaintif kepada defendan kedua, terdapat perjanjian lisan di antara plaintif, defendan pertama dan kedua di mana defendan pertama akan melantik plaintif sebagai kontraktor mereka untuk melapangkan, mengisi dan meratakan tanah-tanah kepunyaan defendan pertama, dengan syarat bahawa plaintif melantik subkontraktor yang dicadangkan oleh defendan pertama iaitu defendan kedua sebagai subkontraktor plaintif untuk menjalankan kerja tersebut. Bayaran kepada plaintif oleh defendan pertama akan dibuat secara 'back to back' sebaik sahaja defendan kedua menerima bayarannya daripada plaintif. Pada 18 November 1997 defendan kedua memberikan bayaran interim pertama sebanyak RM900,000 kepada plaintif untuk bahagian kerja yang disiapkan dan plaintif membayar defendan kedua RM700,000. Pada 20 November 1997, plaintif memberikan tuntutan berperingkat No 1 kepada defendan pertama bagi nilai kerja yang dilakukan sehingga 15 November 1997 sebanyak RM1 juta dan defendan pertama enggan membayar plaintif. Plaintif menghujah bahawa terdapat salah nyata penipuan bahawa defendan kedua melalui defendan ketiga telah mendorong plaintif untuk membayar defendan kedua sejumlah RM700,000 sedangkan pada semua masa material defendan kedua mengetahui bahawa defendan pertama tidak akan membayar plaintif sama sekali. Plaintif juga menghujah bahawa mereka berhak untuk menuntut ganti rugi pra-penyelesaian sebanyak RM50,000 daripada defendan kedua untuk kerja yang tidak disiapkan atas alasan bahawa defendan kedua seharusnya melaksanakan dan menyiapkan kerja tersebut pada 18 Januari 1998. Defendan kedua mengabaikan kerja selepas menerima bayaran RM700,000 daripada plaintif. Defendan-defendan menafikan perjanjian lisan tersebut, liabiliti dan kuantum seperti yang didakwa oleh plaintif. Pesuruhjaya kehakiman yang bijaksana ('PK') menolak tuntutan plaintif dan tuntutan balas defendan pertama. Plaintif memfailkan rayuan ini dan defendan pertama membuat rayuan balas. Isu-isu berikut timbul untuk ditentukan: (i) sama ada PK adalah benar dalam memutuskan bahawa rayuan (1) pernyataan tuntutan plaintif dalah kabur dan tidak boleh dilayan dan seterusnya menolak tuntan plaintif sepenuhnya; (ii) sama ada PK adalah benar dalam menolak tuntutan plaintif terhadap defendan pertama tanpa menghiraukan fakta bahawa

terdapat keterangan bahawa defendan pertama gagal membayar bayaran tuntutan pertama plaintif sebanyak RM1 juta dan oleh itu melanggar perjanjian; (iii) sama ada PK adalah benar dalam memutuskan bahawa perjanjian lisan melanggar s 92 Akta Keterangan 1950 ('Akta'); (iv) sama ada PK adalah benar dalam memutuskan bahawa tidak terdapat salah nyata penipuan oleh defendan-defendan dan/atau defendan ketiga; dan (v) sama ada defendan kedua harus membayar ganti rugi pra-penyelesaian sebanyak RM50,000 sebulan daripada 18 Januari 1998 seterusnya kerana gagal menyiapkan kerja tersebut.

Diputuskan, membenarkan rayuan plaintif dan menolak rayuan-balas defendan pertama:

(1) PK terkhilaf dalam memutuskan bahawa pindaan terhadap rayuan (1) adalah kabur dan tidak boleh dilayan. PK gagal untuk menghargai asas tuntutan plaintif (lihat perenggan 22).

(2) Adalah silap bagi PK untuk menolak keseluruhan tuntutan plaintif apabila terdapat keterangan mencukupi yang dikemukakan yang secara jelas menunjukkan pelanggaran yang dilakukan oleh defendan pertama dan kedua di bawah perjanjian dan surat award (lihat perenggan 35).

(3) Apabila syarat-syarat kontrak dimasukkan ke dalam perjanjian, peraturan umum ialah keterangan ekstrinsik tidak boleh diberikan untuk menyangkal, mengubah, menambah atau menolak perjanjian tersebut. Walau bagaimanapun, keterangan ekstrinsik boleh diperkenalkan bagi menunjukkan kepada umum, bahawa perjanjian bertulis tidak mewakili keseluruhan tawar-menawar di antara pihak-pihak. Bagi membuktikan sama ada terdapat perjanjian bertulis yang sah, keterangan parol boleh diterima bagi menunjukkan bahawa perjanjian bertulis bukanlah satu kontrak yang sah kerana tidak terdapat sebarang perjanjian di antara pihak-pihak (lihat perenggan 46–48).

(4) Tidak terdapat ketidakseragaman di antara perjanjian lisan yang dimaksudkan oleh Anne Kung (SP1), CEO (ketua pengarah urusan) plaintif dengan klausa 6 perjanjian. Klausa 6(b) perjanjian keenam hanya menyatakan bahawa jumlah tersebut perlu dibayar secara berperingkat dalam jangka masa enam bulan daripada tarikh perjanjian. Tetapi, perjanjian tersebut tidak menyatakan 'bila dan bagaimana' defendan pertama seharusnya membuat bayaran berperingkat kepada plaintif dan jurang ini diisi oleh perjanjian lisan. Oleh iti, perjanjian lisan terangkum di dalam lingkungan peruntukan (b) kepada s 92 Akta. Ia tidak menambah atau bercanggah klausa 6(b) perjanjian tetapi sebaliknya, melengkapkan perjanjian dengan membuktikan aturan bayaran 'back to back' di antara pihak-pihak (lihat perenggan 53–56).

(5) PK terkhilaf dalam memutuskan bahawa plaintif gagal untuk memplid

'butiran-butiran penuh' salah nyata penipuan seperti yang dibayangkan di bawah A 18 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980. Menurut A 18 k 12(1), hanya 'butiran-butiran penting' yang perlu diplidkan dan bukannya 'butiran-butiran penuh' seperti yang diminta oleh PK (lihat perenggan 71 & 73).

(6) Defendan ketiga merupakan pengarah umum dan pemegang saham bagi kedua-dua defendan pertama dan kedua. Menurut representasi palsu oleh defendan ketiga, plaintif telah ditipu (lihat perenggan 74 & 77).

(7) Tuntutan plaintif terhadap defendan kedua untuk ganti rugi pra-penyelesaian sebanyak RM50,000 seharusnya dibenarkan kerana terdapat keterangan bahawa defendan kedua mengabaikan kerja selepas menerima RM700,000 daripada plaintif. Plaintif tidak melakukan sebarang pelanggaran penolakan ('repudiatory breach') dan tidak mengarahkan defendan kedua untuk berhenti bekerja (lihat perenggan 78–79).

(8) Di dalam konteks rayuan-balas, defendan pertama gagal untuk membuktikan atau menunjukkan bahawa defendan pertama telah mengalami kerugian. Pada semua masa material, defendan pertama merupakan 'pesalah' kerana enggan membayar plaintif tuntutan berperingkat pertama meskipun keterangan menunjukkan bahawa 30% daripada kerja tersebut telah disiapkan oleh defendan kedua dan bahawa plaintif juga telah membayar sejumlah RM700,000 kepada defendan kedua sebagai sebahagian bayaran (lihat perenggan 80–81).]

Notes

For a case on admissibility, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2176.

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2926–2936.

For cases on liquitated damages, see 3(2) *Mallal's digest* (4th Ed, 2011 Reissue) paras 3981–4009.

For cases on material facts, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6061–6093.

For cases on nature of collateral contract, see 3(2) *Mallal's Digest* (4th Ed, 2010 reissue) paras 3539–3541.

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6160–6199.

Cases referred to

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)

Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur [2006] 2 MLJ 137, HC (refd)

A *Automatic Self-Cleansing Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34, CA (refd)
Baldev Singh v Mahima Singh & Ors [1974] 2 MLJ 206 (refd)
Bangkok Bank Ltd v Prosperity Shipping & Trading (Pte) Ltd & Ors [1990] 1 MLJ 29 (refd)
B *Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83, FC (refd)
Clowes v Higginson (1813) 1 Ves & B 524 (refd)
Curtis v Chemical Cleaning and Dyeing Co [1951] 1 KB 805; [1951] 1 All ER 631, CA (refd)
Davis v Symonds (1787) 1 Cox Eq Cas 402 (refd)
C *Dobell v Stevens* (1825) 3 B & C 623 (refd)
Ferguson v Wilson (1866) LR 2 Ch App 77, CA (refd)
Foster v Mackinnon (1869) LR 4 CP 704 (refd)
Gold v Patman and Fotheringham Ltd [1958] 2 All ER 497; [1958] 1WLR 697, CA (refd)
D *Great Eastern Railway Company v Turner* [1872] 8 Ch App 149 (refd)
Henry Williams And Others v James Bayley (1866) LR 1 HL 200, HL (refd)
Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal [1993] 1 SLR 73, CA (refd)
E *Hutton v Watling And Another* [1948] Ch 398; [1948] 1 All ER 803, CA (refd)
John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard (1856) 6 El & Bl 370 (refd)
John Shaw & Sons (Salford), Limited v Peter Shaw and John Shaw [1935] 2 KB 113, CA (refd)
F *Joscelyne v Nissen and another* [1970] 2 QB 86; [1970] 1 All ER 1213, CA (refd)
Lam Soon Oil and Soap Manufacturing Sdn Bhd & Anor v Whang Tar Choung & Anor [2002] 2 SLR 395, HC (refd)
Law Ngei Ung & Anor v Tamansuri Sdn Bhd [1989] 2 CLJ (Rep) 44, HC (refd)
Letchumanan v Eng Mee Yong & Ors [1977] 1 MLJ 7, FC (refd)
G *Lim Kee Tiak v Lim Kee Tian* [1987] 2 MLJ 528 (refd)
Looi Guan Kway against Low Lean Bok and others [1939] 7 MLJ 35 (refd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673, FC (refd)
Madell v Thomas & Co [1891] 1 QB 230, CA (refd)
H *Moore v Garwood* (1849) 4 Exch 681 (refd)
Moschi v Lep Air Services Ltd and another [1972] 2 All ER 393, HL (refd)
Orion Insurance Co plc v Sphere Drake Insurance plc [1992] 1 Lloyd's Rep 239, CA (refd)
Pickering and Others v Dowson and others (1813) 4 Taunt 779 (refd)
I *Reuss and another v Picksley and another* (1866) LR 1 Exch 342 (refd)
Scriven Brothers & Co v Hindley & Co [1913] 3 KB 564 (refd)
Sierra Leone Telecommunications Co Ltd v Barclays Bank plc [1998] 2 All ER 821 (refd)
Spedding v Fitzpatrick (1888) 38 Ch D 410, CA (refd)

Stewart v Eddowes and another, Hudson and others v Stewart (1874) LR 9 CP 311 (refd)
Stones v Dowler (1860) 29 LJ Ex 122 (refd)
Tan Ah Theam & Ors v Ong Han Meng [2000] 4 MLJ 193, CA (refd)
Tan Sri Dato Paduka (Dr) Ting Pek Khing v Hii Chang Pee @ Hu Chang Pee [2003] 2 MLJ 378, HC (refd)
Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289, HC (refd)
Thorp v Holdsworth (1876) 3 Ch D 637 (refd)
Ultra Dimension Sdn Bhd v Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party) [2000] 6 CLJ 548, HC (refd)
Williams v Jones (1826) 5B & C 108 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Evidence Act 1950 s 92, 92(b)
Rules of the High Court 1980 O 18 r 12, O18 r 12(1)

Appeal from: Suit No 23–53 of 2000–II (High Court, Kuching)

Jammie Tai (Tang & Partners) for the plaintiff/appellant.
Paul Tang Nguong Wee (Tan, Yap & Tang) for the first and third defendants/respondents.
Jee Baldeweh Singh (JB Singh & Co) for the second defendant/respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The parties will be referred to like what they were referred to at the High Court. Thus, Quality Concrete Holdings Bhd will be referred to as the plaintiff while Classic Gypsum Manufacturing Sdn Bhd will be referred to as the first defendant. And Classic Ceiling Design And Construction Sdn Bhd will be referred to as the second defendant. Sim Chin Kui, an individual, will be referred to as the third defendant.

[2] After a full trial at the Kuching High Court, the learned judicial commissioner ('JC') dismissed the plaintiff's claim with costs to the defendants. The learned JC also dismissed the first defendant's counterclaim against the plaintiff with costs.

[3] On 12 November 2007, the plaintiff filed a notice of appeal to this court against the whole decision of the learned JC.

[4] On 22 December 2007, the first defendant filed a notice of cross-appeal

to this court.

FACTS OF THE CASE

[5] On 15 October 1997, the first defendant and the plaintiff executed an earthfilling agreement whereby the first defendant ('employer') engaged the plaintiff ('main contractor') to complete site clearing, earth filling and levelling (referred to as 'the said work') of Lots 565, 592 and 593 — all located at Block 4 Muara Tebas Land District for a contract sum of RM3.4m ('the said work').

[6] By way of an award letter dated 18 October 1997, the plaintiff appointed the second defendant to carry out the actual work for the said project for a contract sum of RM3.2m to be completed on or before 18 January 1998.

[7] According to the plaintiff, it was orally agreed between the plaintiff and the first defendant that the first defendant would engage the plaintiff to carry out the said work on condition that the plaintiff engaged the second defendant as its subcontractor to carry out the actual work and that payment to the plaintiff by the first defendant will be made back to back immediately upon the second defendant receiving its payment from the plaintiff. The said oral agreement was reached by Anne Kung ('PW1') — the executive director of the plaintiff, and the third defendant ('DW2') — the common director and shareholder of the first and second defendants.

[8] It was based on this oral agreement that the second defendant submitted its first progress claim of RM900,000 to the plaintiff on 18 November 1997 as reflected at p 429 of the appeal record at Vol 11/Part 'C' and on 20 November 1997 the plaintiff submitted their first payment claim of RM1m to the first defendant based on the value of the work done as at 15 November 1997 as seen at p 481 of the appeal record at Vol 11/Part 'C'.

[9] On 27 November 1997, the plaintiff paid the second defendant a partial payment of RM700,000 as shown at p 482 of the appeal record at Vol 11/Part 'C' and the third defendant admitted receiving it on behalf of the second defendant.

[10] But, in due course when the plaintiff asked for its payment of RM1m from the first defendant, the first defendant refused to pay and honour 'the back to back' payment arrangement. On the contrary, the first defendant represented by the third defendant denied that there was ever such an oral agreement and refused to pay the plaintiff the sum of RM1m.

[11] The plaintiff contended that the defendants have acted in concert

through the representation of the third defendant to defraud the plaintiff. The plaintiff then instructed its solicitors Messrs Tang & Partners to file the present action to recover the said sum from the defendants.

THE AGREED FACTS

[12] Within a short compass, the facts that are not in dispute are as follows:

(a) the earthfilling agreement executed between the first defendant and the plaintiff on 15 October 1997 as seen at pp 389–393 of the appeal record at Vol 11/Part 'C';

(b) the award letter issued by the plaintiff to the second defendant appointing the second defendant as the plaintiff's subcontractor to carry out the actual work as reflected at pp 394–395 of the appeal record at Vol 11/Part 'C;

(c) the completion date for the said work was fixed on 18 January 1998;

(d) on 18 November 1997, the second defendant submitted its first interim payment to the plaintiff for RM900,000 as reflected at p 396 of the appeal record at Vol 11/Part 'C';

(e) on 27 November 1997, the plaintiff paid the second defendant RM700,000 via MBB cheque No 927342 as seen at p 398 of the appeal record at Vol 11/Part 'C'; and

(f) the second defendant did not complete the said work on 18 January 1998.

THE DISPUTED FACTS

[13] The disputed facts are as follows:

(a) there was an oral agreement reached between Anne Kung (PW1) and the third defendant (DW2) that the first defendant would engage the plaintiff to carry out the said work on condition that the plaintiff engaged the second defendant as its subcontractor to carry out the actual work and that payment to the plaintiff by the first defendant will be made *back to back* immediately upon the second defendant receiving its payment from the plaintiff;

(b) that there was fraudulent misrepresentation between the defendants (particularly through the representation of the third defendant) to defraud the plaintiff when the second defendant claimed from the plaintiff RM900,000 knowing fully well that the first defendant would not pay the plaintiff immediately or at all; and

(c) the third defendant who is the common director and shareholder of the

first and second defendants had fraudulently misrepresented to the plaintiff that the first defendant would pay the plaintiff the sum of RM1m by giving false assurances to Anne Kung (PW1) that the first defendant will pay the plaintiff.

ANALYSIS

[14] On perusal of the plaintiff's memorandum of appeal, we compartmentalised them into five simple questions.

[15] Firstly, whether the learned JC was right in law and in fact when he held that prayer (1) of the plaintiff's statement of claim was ambiguous and cannot be entertained and, consequently, he dismissed the plaintif's claim entirely?

[16] Secondly, whether the learned JC was right in law and in fact to dismiss the plaintiff's claim against the first defendant notwithstanding the fact that there was evidence that the first defendant had failed to pay the plaintiff's first payment claim of RM1m and thereby breaching the earthfilling agreement?

[17] Thirdly, whether the learned JC was right in law and in fact in holding that the oral agreement infringed s 92 of the Evidence Act 1950?

[18] Fourthly, whether the learned JC was right in law and in fact in holding that there was no fraudulent misrepresentation by the defendants and/or the third defendant?

[19] Fifthly, whether the second defendant ought to pay the pre-liquidated damages of RM50,000 per month from 18 January 1998 onwards for failing to complete the said work?

THE FIRST AND THE SECOND QUESTIONS

[20] We take the first and the second questions together. Prayer (1) of the statement of claim was amended on the request of the plaintiff's counsel with no objections by the defendants. The amendment was worded in this fashion:

> Against the defendants each of them the sum of RM1,000,000.00; or alternatively, damages.

[21] The court may at any stage of the proceedings allow the plaintiff to amend its pleading on such terms as to costs or otherwise as may be just and in such manner as the court may direct. It must be borne in mind that where the proposed amendment does not change the character of the dispute and made

on a bona fide basis without causing any prejudice to the opposite party which could be compensated with costs, the court would readily allow the amendment (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 (FC); and *Ultra Dimension Sdn Bhd v Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party)* [2000] 6 CLJ 548).

[22] The primary reason to allow an application to amend the pleadings is the need to ensure a fair trial of the action (*Lam Soon Oil and Soap Manufacturing Sdn Bhd & Anor v Whang Tar Choung & Anor* [2002] 2 SLR 395). But the amendment will not be allowed if the resulting prejudice cannot be compensated in costs (*Tan Sri Dato Paduka (Dr) Ting Pek Khing v Hii Chang Pee @ Hu Chang Pee* [2003] 2 MLJ 378).

[23] So long as the amendments are crucial for a proper and fair determination of the disputes between the parties and such amendments would not prejudice the opposite parties, such amendments would be allowed (*Looi Guan Kway against Low Lean Bok and others* [1939] 7 MLJ 35; *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (FC); and *Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137).

[24] We have perused through the evidence and we must categorically say that the learned JC erred when he held that the amendment to prayer (1) was ambiguous and cannot be entertained. With respect, we say that the learned JC failed to appreciate the basis of the plaintiff's claim.

[25] The defendants have acted in concert through the representation of the third defendant (DW2) — the common director and shareholder of the first and second defendants, to defraud the plaintiff when they knew fully well that the first defendant has no intention to pay the plaintiff immediately or at all. That being the position, the defendants or anyone or more must be made to pay the plaintiff the sum of RM1m.

[26] It is the duty of the learned JC to make a finding whether there was a breach on the part of the defendants or anyone or more, and only then would the consideration of making an award be made accordingly. With respect, the learned JC erred when he said that it was not for the court to 'pick and choose' in what amount the defendants were liable in relation to a specific pleading. We categorically say that it all depends on the finding of facts.

[27] The third defendant (DW2) is a powerful individual. As a common director of the first and second defendants, the third defendant (DW2) acquires various legal capacities. He wears many hats. He is considered to be an

agent of the first and second defendants. His relationship with the first and second defendants is that of a fiduciary. At times he is also considered to be a trustee.

[28] The Court of Appeal in *Automatic Self-Cleansing Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 made it clear that the division of powers between the board of directors and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that where powers had been vested in the board the general meeting could not interfere with their exercise. The relevant article in that case provided that the management of the company should be vested in the directors who might exercise all the powers of the company which were not by the statutes or the articles expressly required to be exercised by the company in general meeting.

[29] The company in *Baldev Singh v Mahima Singh & Ors* [1974] 2 MLJ 206 were transport operators and they had resolved in their annual general meeting to incorporate Malay participation in the company and to have such Malay participation up to 30% of the issued and paid up capital of the company from shareholders approved by the Negeri Sembilan Transport Operators' Association. The directors of the company subsequently decided to issue shares to Malay employees of the company though they were not approved by the Negeri Sembilan Transport Operators' Association. Hashim Yeop A Sani J (later Chief Judge of Malaya) interpreted article 46 of the articles of association and held that once the members in general meeting of the company resolve on the manner of allotment it will not be open to the directors to act contrary to the resolution subsequently. His Lordship further held that to construe article 46 otherwise would be tantamount to encouraging conflicting control of activities of the two primary organs of the company.

[30] Again, on the powers of directors, Greer LJ in *John Shaw & Sons (Salford), Limited v Peter Shaw and John Shaw* [1935] 2 KB 113 had this to say (see p 134):

> A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

[31] Wayback in 1866, Sir HM Cairns LJ in *Ferguson v Wilson* (1866) LR 2 Ch App 77 aptly said (see p 89):

> What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent.

[32] In *Great Eastern Railway Company v Turner* (1872) LR 8 Ch App 149, Lord Selborne LC had this to say (see p 152):

> The directors are the mere trustees or agents of the company — trustees of the company's money and property — agents in the transactions which they enter into on behalf of the company.

[33] We just cannot sweep under the carpet, so to speak, the contentions of the plaintiff that the third defendant (DW2) as a common director and shareholder of the first and second defendants had fraudulently induced the plaintiff to make the necessary payment to the second defendant upon the representation that the first defendant would immediately pay the plaintiff.

[34] Notwithstanding that Anne Kung (PW1) was, at the material time, the CEO ('chief executive officer') of the plaintiff — a public listed company on the KLSE ('Kuala Lumpur Stock Exchange'), as well as a qualified lawyer and accountant, she was nonetheless fraudulently induced by the third defendant (DW2) to make the necessary payment to the second defendant bearing in mind the status of the third defendant (DW2) as the common director of the first and second defendants. The powers of the third defendant (DW2) as the common director of both companies cannot be denied.

[35] In our judgment, it was wrong for the learned JC to dismiss the whole claim of the plaintiff when there was ample evidence adduced that blatantly pointed to the breach committed by the first and second defendants under the two contracts — the earthfilling agreement dated 15 October 1997 and the award letter dated 18 October 1997.

[36] The learned JC failed to give proper evidentiary value to the facts that the first defendant's refusal to pay and honour its obligations under the earthfilling agreement constituted a breach of the contract and compounded by the testimony of Sim Tsin Hock (also known as 'Ah Hock') ('DW1') that 30% of the work was completed as at 15 November 1997.

[37] Looking at the available evidence, we are constrained to hold that the learned JC should have allowed the plaintiff's claim against the first defendant.

At the very least, there should be judgment against the second defendant and/or the third defendant for those 30% of the work done.

[38] It is also our judgment that the learned JC erred when he held that the plaintiff failed to prove the value of the work done. This was certainly against the evidence of Sim Tsin Hock (also known as 'Ah Hock') (DW1) who testified that the second defendant had completed 30% of the said work (see p 131 of the appeal record at Vol 1/Part 'A' & 'B' at para 15).

[39] There was no dispute that the earthfilling agreement is a legal, binding and enforceable contract. Yet, surprisingly the plaintiff could not enforce the earthfilling agreement.

[40] It is apparent that there was a misdirection in law by the learned JC when His Lordship, even without the assistance of the oral agreement, failed to hold that the earthfilling agreement is a valid and binding contract between the plaintiff and the first defendant.

[41] We have seen and read the earthfilling agreement dated 15 October 1997 between the first defendant and the plaintiff and this can be seen at pp 612–616 of the appeal record at Vol 11/Part 'C'. The signatures of the parties can be seen at p 616 of the same appeal record. It is a valid and binding contract. *Pollock Principles of Contract* (13th Ed), at p 1, defined contract as 'a promise or set of promises which the law will enforce'. It is also ideal to read the case of *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821.

[42] A contract is said to be executory so long as anything remains to be done under it by any party, and executed when it has been wholly performed by all parties. The earthfilling agreement can be described as an executory contract.

THE THIRD QUESTION

[43] We now turn our attention to an important issue in this appeal. It concerned the refusal by the learned JC to allow admission of the oral agreement to contradict, vary, add or substract from the terms of the earthfilling agreement and the award letter.

[44] That oral agreement was reached between Anne Kung (PW1) and the third defendant (DW2) and it brought into sharp focus the 'back to back' payment arrangement. Dato' Seri Visu Sinnadurai in his *Law of Contract*, (3rd Ed), Vol 1, at p 190 under subtopic 'Extrinsic evidence' had this to say:

4.36 Statutory provisions: sections 91 and 92 of the Evidence Act 1950. The extent to which oral evidence may be admitted to modify a written contract is provided for in sections 91 and 92of the Evidence Act 1950. The general rule, as found in section 91, is that: 'where the terms of a contract … have been reduced by consent of the parties to the form of a document … no evidence shall be given in proof of the terms of the contract …'

Section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written agreement. Certain exceptions to this general rule are also provided for, for example, any fact may be proved which would invalidate a document such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration and mistake in law or fact: see proviso (a) to section 92.

[45] The learned author continued to say at p 191, at para 4.37 spilling over to p 192 as follows:

4.37 Written agreements: application of sections 91 and 92 of the Evidence Act 1950. The Federal Court in the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC considered the scope of section 92 of the Evidence Act in detail. In this case, though the parties had entered into a written agreement, the respondents attempted to introduce other terms which they alleged had not been incorporated into the written agreement. The trial judge had, relying on the decision in *Coalfields of Burma Ltd v HH Johnson* AIR 1925 Rang 128, a case in which there was no written contract, admitted the evidence of the respondent. The Federal Court pointed out that reliance by the trial judge on Coalfields' case was wrong as he had not distinguished the case on the ground that there was no written contract in that case whereas, in the instant case, there was a written agreement. The Federal Court further pointed out that:

'Section 92 specifically excludes evidence to contradict, vary, add to or subtract from any of the terms of contract in writing, except in any of the situations spelled out in the provisos thereto.'

The court relied on the cases of *Foo Tock Lim v Piong Liew* [1963] MLJ 67and *Siah v Tengku Nong* [1964] MLJ 43. The Federal Court also pointed out the danger of admitting oral evidence in cases where there is a written agreement:

'… it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law.'

The court then went on to consider whether the evidence purported to be adduced by the respondents could fall within the provisos to section 92. The court, after stating that:

'… the provisos qualify but do not eliminate the main provisions of the section, so that unless the additional evidence sought to be adduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agreement,'

held that the present evidence did not fall within any of the provisos.

[46] We gratefully adopt what Dato' Seri Visu Sinnadurai wrote in his popular book entitled *Law of Contract* and we venture to add the following salient points. Where the terms of the contract have been incorporated into an agreement, the general rule is that extrinsic evidence may not be given to contradict, vary, add to, or substract the said agreement. This general rule was expressed way back in *Davis v Symonds* (1787) 1 Cox Eq Cas 402 at pp 404–405; and in *Williams v Jones* (1826) 5B & C 108.

[47] However, extrinsic evidence may be introduced to show to the world at large, so to speak, that the written agreement did not represent the whole bargain between the parties (*Stones v Dowler* (1860) 29 LJ Ex 122, Ex Ch; *Reuss and another v Picksley and another* (1866) LR 1 Exch 342, Ex Ch; *Stewart v Eddowes and another, Hudson and others v Stewart* (1874) LR 9 CP 311; *Moore v Garwood* (1849) 4 Exch 681, Ex Ch; *Hutton v Watling And Another* [1948] Ch 398; [1948] 1 All ER 803 (CA); and, *Gold v Patman and Fotheringham Ltd* [1958] 2 All ER 497; [1958] 1WLR 697(CA)).

[48] In order to show whether there is a valid written agreement, parol evidence may be admissible in order to show that the written agreement is not a valid contract because there was never any agreement between the parties (*Scriven Brothers & Co v Hindley & Co* [1913] 3 KB 564).

[49] Extrinsic evidence may also be admitted in the interpretation of a written agreement in the following situations:

(a) where there is an allegation that the signature is void under the non est factum rule (*Foster v Mackinnon* (1869) LR 4 CP 704);

(b) where the written agreement is subject to a condition precedent (*John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard* (1856) 6 El & Bl 370);

(c) where the written agreement is not intended to give rise to a contractual relationship (*Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239 (CA));

(d) where the written agreement does not correspond with the prior oral agreement between the parties (*Joscelyne v Nissen and another* [1970] 2 QB 86; [1970] 1 All ER 1213 (CA)); and

(e) where the application is made in order to show that an apparently valid contract has been invalidated by duress (*Henry Williams And Others v James Bayley* (1866) LR 1 HL 200), fraud (*Pickering and others v Dowson and others* (1813) 4 Taunt 779; and *Dobell v Stevens* (1825) 3 B & C 623),

illegality (*Madell v Thomas & Co* [1891] 1 QB 230 (CA)), misrepresentation (*Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; [1951] 1 All ER 631(CA)), mistake (*Clowes v Higginson* (1813) 1 Ves & B 524), and frustration.

[50] These are general principles of law which should be used as guidelines. In the context of the present appeal, the learned JC failed to consider proviso (b) to s 92 of the Evidence Act 1950 which states as follows:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

[51] *Sarkar's Law of Evidence*, Vol 1, at p 1246 carries the following write-ups germane to the occasion at hand:

> Law is well settled that when a document in writing does not contain the entire agreement but embodies only some of the conditions oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is clearly admissible.

[52] Continuing at the same page and spilling over to p 1247, the learned author had this to say:

> When there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given only when such agreement is not inconsistent with or does not contradict the terms of the document (*Lakshmiayya v Murahari, A* 1930 M 547). The proviso requires that (i) the separate agreement should relate to any matter on which the document is silent and (ii) that it is not inconsistentwith its terms.

[53] In our judgment, there is no inconsistency between the oral agreement alluded to by Anne Kung (PW1) with cl 6 of the earthfilling agreement. That cl 6 states as follows:

> 6.
>
> (a) The Employer shall pay to the Contractor the contract sum of RINGGIT MALAYSIA THREE MILLION AND FOUR HUNDRED THOUSAND ONLY (RM3,400,000.00).
>
> (b) The said contract sum shall be paid progressively to the Contractor within Six (6) months from the date of this Agreement.

[54] Now, cl 6(b) of the earthfilling agreement merely states that the said

sum to be paid progressively within six months from the date of the said earthfilling agreement. But, it is silent as to 'when and how' the first defendant ought to make its progressive payment to the plaintiff and this gap is filled in by the oral agreement.

[55] That being the case, the oral agreement alluded to by Anne Kung (PW1) falls squarely within the ambit of proviso (b) to s 92 of the Evidence Act 1950. It does not add or contradict cl 6(b) of the earth-filling agreement. On the contrary, the oral agreement complements the earthfilling agreement.

[56] The oral agreement merely intended to prove that it was orally agreed that there was a 'back to back' payment arrangement between the parties.

[57] Here, evidence was adduced by the plaintiff that there exist an oral agreement between the plaintiff and the first defendant. Indeed there were three sets of contemporaneous documents to establish the truth of the existence of the oral agreement.

THE FIRST SET OF CONTEMPORANEOUS DOCUMENTS

[58] The first set of contemporaneous documents were between the draft subcontract agreement in exh P4 as seen at pp 510–519 of the appeal record at Vol 11/Part 'C' and the draft construction agreement in exh P5 as seen at pp 520–524 of the appeal record at Vol 11/Part 'C'.

[59] Alvin Chong Chee Vun ('PW4') testified that he was instructed by Sim Tsin Hock (also known as 'Ah Hock') (DW1) to prepare exhs P4 and P5 on or about 14 October 1997 and that after preparing the same, he faxed over exhs P4 and P5 together to Anne Kung (PW1) on the same day at 4.37pm for her verification. Anne Kung (PW1) testified that she had spoken to Alvin Chong Chee Vun (PW4) over the telephone in regard to exhs P4 and P5 and she confirmed to PW4 that the terms in exhs P4 and P5 were correct as orally agreed between the plaintiff, the first and the second defendants.

[60] A strong probative value must be attached to this first set of contemporaneous documents. A perusal of exh P4 would show that it was the intention of the plaintiff, as well as the first and second defendants to be bound by the 'back to back' payment arrangement and that both the contracts between the plaintiff and the first defendant on the one hand and between the plaintiff and the second defendant on the other hand were meant to be co-existing.

[61] The intention of the parties can be gleaned from exh P4 particularly cl 1, cl 3(b) and cl 7(a). Clause 1 of exh P4 reads as follows:

> The sub-contractor shall be deemed to have notice of all the provisions of the main contract together with the specifications which forms a part thereof.

[62] Clause 3(b) of exh P4 is worded in this way:

> The contractor shall pay the subcontract sum to the sub-contractor in accordance with the terms of payment in the main contract.

[63] Clause 7(a) of exh P4 reads as follows:

> The sub-contractor shall commence the main contract works within the time which the contractor is to commence the same under the main contract and shall proceed with the same with due expedition.

[64] Of course, exh P4 was not executed and it was subsequently replaced by the award letter but its mere existence confirmed the truth about the existence of the oral agreement as contended by the plaintiff. In our judgment, the existence of exh P4 fortified the plaintiff's version of the existence of the oral agreement.

[65] Sim Tsin Hock (also known as 'Ah Hock') (DW1) merely denied the existence of the oral agreement but he did not venture to explain why exh P4 was in existence and was prepared in such terms and manner.

[66] And looking at the proximity of time between the discussions held between the parties and the date when exh P4 was prepared, we can safely conclude that exh P4 was the outcome of some oral agreement that had been reached between the parties.

THE SECOND SET OF CONTEMPORANEOUS DOCUMENTS

[67] Now, the second set of contemporaneous documents would be the earthfilling agreement dated 15 October 1997 and the award letter dated 18 October 1997. These two documents were prepared and executed three days apart from one another. Looking at their proximity, one can safely conclude that it was the intention of the parties that the contract between them was meant to be a 'back to back' arrangement. These two documents are co-dependent on one another and they relate to the same subject matter.

[68] Due to their contemporaneity, the allegations of the first and second defendants in their defence that the plaintiff has appointed the second defendant on its own accord cannot be said to be the truth.

A THE THIRD SET OF CONTEMPORANEOUS DOCUMENTS

[69] The documents involved here were between the second defendant's first interim payment for RM900,000 dated 18 November 1997 as seen at p 480 of the appeal record at Vol 11/Part 'C' and the plaintiff's first progress claim for RM1m dated 20 November 1997 as seen at p 481 of the same appeal record.

[70] In our judgment, these three sets of contemporaneous documents categorically support the plaintif's version of an oral agreement in regard to the 'back to back' arrangement between the plaintiff, the first and the second defendants.

THE FOURTH QUESTION

[71] Patently the learned JC erred when he held that the plaintiff failed to plead the 'full particulars' of the fraudulent misrepresentation as envisaged under O 18 r 12 of the Rules of the High Court 1980 ('RHC'). In reality, the plaintiff pleaded at para 11 of the amended statement of claim at p 64 of the appeal record at Vol 1/Part 'A' and 'B' as follows:

> Particulars of Falsity
>
> The defendant knew and intended that the first defendant would not make any immediate payment or any payment at all to the plaintiff as represented.

[72] Pleadings, as a general rule, should contain particulars to ensure that the parties are informed with reasonable particularity as to the matters which are alleged against them. The reason for this simple principle is this. That no party should be taken by surprise (*Lim Kee Tiak v Lim Kee Tian* [1987] 2 MLJ 528; and *Bangkok Bank Ltd v Prosperity Shipping & Trading (Pte) Ltd & Ors* [1990] 1 MLJ 29). Another reason would be the desire to limit and define the issues at the trial (*Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615) as well as to save time and expense (*Spedding v Fitzpatrick* (1888) 38 Ch D 410). All these would surely put the parties in a better position to prepare for trial (*Thorp v Holdsworth* (1876) 3 Ch D 637).

[73] According to O 18 r 12(1) of the RHC only the 'necessary particulars' need be pleaded and not the 'full particulars' as required by the learned JC. It is obvious that the learned JC erred in law on this point.

[74] According to the learned JC, there was no fraudulent misrepresentation on the part of the defendants and/or the third defendant against the plaintiff. But the evidence showed, at the expense of some repetition, that the third defendant was the common director and shareholder of both the first and the

second defendants. To compound the matter further, the third defendant was the major shareholder of both the first and the second defendants. It is not surprising that the third defendant wielded power and exercised effective control over the operations of both the first and the second defendants. We agree with the contention of the plaintiff's counsel that the third defendant was used as a conduit by the first and the second defendants to cheat the plaintiff.

[75] The third defendant succeeded in using the first and the second defendants to defraud the plaintiff and in the process thereof the third defendant achieved unjust personal gains. It was through this fraudulent transaction that the third defendant gained the sum of RM700,000 from the plaintiff through the second defendant and yet the first defendant influenced by the third defendant deliberately refused to pay the plaintiff.

[76] The evidence showed that the third defendant was the person who requested payment from the plaintiff on behalf of the second defendant and it was the third defendant who collected RM700,000 from the plaintiff on 27 November 1997. And according to Anne Kung (PW1), it was the third defendant who gave her false assurances that the first defendant would pay. The overbearing character and positions held by the third defendant must have been too much for Anne Kung (PW1) to bear.

[77] By virtue of the false representation by the third defendant, the plaintiff was defrauded. And Anne Kung (PW1) had to part with the sum of RM700,000 for the benefit of the third defendant.

THE FIFTH QUESTION

[78] It is our judgment that the learned JC ought to allow the plaintiff s claim against the second defendant for pre-liquidated damages of RM50,000 because there was evidence that the second defendant abandoned the said work after receiving RM700,000 from the plaintiff.

[79] It is also our judgment that the plaintiff has not committed any repudiatory breach. There was no evidence to show that the plaintiff has instructed the second defendant to stop work. It is mischievous on the part of the second defendant to allege that the plaintiff intended to repudiate the contract when the plaintiff paid only RM700,000 and not RM900,000.

THE CROSS-APPEAL

[80] In the context of the cross-appeal by the first defendant, we have this to say. That the learned JC was correct in holding that the first defendant had failed to prove or show that the first defendant had suffered damages.

[81] At all material times, the first defendant was the 'wrong doer' for refusing to pay the plaintiff the first progressive claim despite the evidence that showed that 30% of the said work has been completed by the second defendant and that the plaintiff has even paid the second defendant the sum of RM700,000 as partial payment.

[82] In our judgment, as the 'wrong doer' and the party at fault, the first defendant cannot now ask for a second bite of the proverbial cherry by claiming for the pre-liquidated damages of RM50,000.

[83] In the context of the second ground, we hold that the learned JC was correct in dismissing the first defendant's application to amend its counterclaim at the eleventh hour. It is our judgment that the first defendant's application to amend its counterclaim was nothing more than mere afterthoughts lacking in bona fide and totally unsubstantiated.

CONCLUSION

[84] It must be borne in mind that the plaintiff is still legally entitled under the earthfilling agreement to be paid by the first defendant for work done as at 15 November 1997 for the sum of RM1m. The failure on the part of the plaintiff to secure RM1m has caused great injustice and hardship to the plaintiff bearing in mind that the plaintiff has paid a total sum of RM700,000 to the second defendant yet the plaintiff was unable to collect any payment from the first defendant. The learned JC failed to recognise that it was the first defendant who had breached the earthfilling agreement. It was a fundamental breach that went to the root of the contract (*Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83 (FC); *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal* [1993] 1 SLR 73 (CA); *Letchumanan v Eng Mee Yong & Ors* [1977] 1 MLJ 7 (FC); *Tan Ah Theam & Ors v Ong Han Meng* [2000] 4 MLJ 193 (CA); *Law Ngei Ung & Anor v Tamansuri Sdn Bhd* [1989] 2 CLJ (Rep) 44; *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289; and *Moschi v Lep Air Services Ltd and another* [1972] 2 All ER 393 (HL)).

THE PLAINTIFF'S APPEAL

[85] For the reasons alluded to above, we unanimously allowed the plaintiff's appeal with costs of RM30,000. We accordingly set aside the decision of the High Court. The deposit to be refunded to the plaintiff. We made a further order that interest will be calculated at the rate of 8%pa from the date of the writ to the date of full payment.

THE FIRST DEFENDANT'S CROSS-APPEAL

[86] We unanimously dismissed the first defendant's cross-appeal with costs

of RM10,000. We too affirmed the decision of the High Court. The deposit should go to the plaintiff as part of the costs.

[87] This judgment in draft has been shown to my brothers Azhar Hj Ma'ah JCA and Clement Allan SkinnervJCA and they both expressed their concurrence with it.

Plaintiff's appeal allowed and first defendant's cross-appeal dismissed.

Reported by Kanesh Sundrum